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In the Supreme Court of the United States

No. 789.
OCTOBER TERM, 1964.

RAYMOND D. HOWELL,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO.

REPLY BRIEF OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

BERNARD A. BERKMAN,
1320 Superior Building,
Cleveland 14, Ohio,
Counsel for Petitioner.

GEORGE S. ROEST,
187½ E. Center St.,
Marion, Ohio,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-5647

TABLE OF CONTENTS.

Reply Brief of Petitioner to Respondent's Brief in Opposition to Petition for Writ of Certiorari 1

A. The "no comment" rule is a command of the Fifth and Fourteenth Amendments 3

B. The constitutional validity of the provision of the Ohio Constitution in issue here is not well settled at all 8

C. A jury charge by the court that the state must establish the guilt of the accused by evidence beyond a reasonable doubt does not cure the constitutional defect 10

D. The prosecutor's comment and the court's charge to the jury were prejudicial to defendant even though, in the absence of such comment and instructions, the jury might have considered the failure of the accused to testify 11

E. Petitioner has properly preserved the issues for review and shown prejudice 12

Conclusion 15

Application to Consolidate With Another Pending Case in Advance of Argument or, in the Alternative, in Advance of Re-Argument 17

TABLE OF AUTHORITIES.

Cases.

Adamson v. California, 332 U. S. 46 (1947) ... 3, 7, 13

Bruno v. United States, 308 U. S. 287 (1939) ... 3

Counselman v. Hitchcock, 142 U. S. 547 (1892) ... 7

DeLuna v. United States, 308 F. 2d 140 (5th Cir. 1962) ... 3, 6, 12

Fahy v. Connecticut, 375 U. S. 85 (1963) ... 11, 12

Gompers v. United States, 233 U. S. 604 (1915) ... 10

Griffin v. California, No. 202, October Term, 1964 ... 9

Grunewald v. United States, 353 U. S. 391 (1957) ... 14

Hayes v. Smith, 62 Ohio St. 161 (1960) ... 13

Johnson v. United States, 318 U. S. 189 (1943) ... 4

Krulewitch v. United States, 336 U. S. 440 (1949) ... 11

Landesman v. Western Reserve University, 132 Ohio St. 131 (1936) ... 13

Malloy v. Hogan, 378 U. S. 1 (1964) ... 1, 2, 3, 5, 6, 8, 9, 10, 13

Mapp v. Ohio, 367 U. S. 643 (1961) ... 7

Maryland v. Baltimore Radio Show, 338 U. S. 912 (1950) ... 8

Nash v. United States, 54 F. 2d 1006 (2d Cir. 1932) 11

Phelin v. Kenderdine, 20 Pa. 354 (1853) ... 4

Quinn v. United States, 349 U. S. 155 (1950) ... 7

Rosenberry v. Chumney, 171 Ohio St. 48 (1960) ... 13

Shott v. Tehan, 373 U. S. 240, rehearing denied 374 U. S. 858 (1963) ... 8, 9

Simko v. Miller, 133 Ohio St. 345 (1938) ... 13

Stewart v. United States, 366 U. S. 1 (1961) 5

Thatcher v. Penn., O & D Rd. Co., 33 Ohio App. 242 (Lucas 1928) 13

Twining v. New Jersey, 211 U. S. 77 (1908) 3, 13

Ullman v. United States, 350 U. S. 422 (1955) 7

United States v. Gainey, __ U. S. __, No. 13, October Term, 1964, 33 U. S. L. Week 4200 (March 1, 1965) 5, 9

United States v. Ragland, 306 F. 2d 732 (4th Cir. 1962) 6

United States v. Tehan, 337 F. 2d 990 (6th Cir. 1964) petition for certiorari filed 2/4/65 *sub nom. Tehan v. Shott*, 33 U. S. L. Week 3275 ..... 6, 9

Wilson v. United States, 149 U. S. 60 (1893) 3, 5, 14

Constitution and Statutes.

Constitution of the United States:

Fifth Amendment 2, 3, 4, 5 7, 8, 9, 10, 12, 14

Fourteenth Amendment 3

Ohio Revised Code § 2321.03 13

18 U. S. C. A. § 3481 3

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vs.

STATE OF OHIO,
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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO.

REPLY BRIEF OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent's brief admits that the record in the case at bar presents squarely to this Court the question of the validity, in the light of *Malloy v. Hogan,* 378 U. S. 1 (1964), of the provision in the Ohio Constitution which permits counsel to comment adversely upon, and the Court and jury to consider in weighing the guilt of the accused, his constitutional refusal to testify in his own defense (RB. 5).[1]

[1] References to Respondent's brief throughout this brief will be by "RB" followed by a page number. References to the transcript of the record will be by "R" followed by a page number and "P" will precede the page number of references to the petition for certiorari. Emphasis and bracketed material, unless otherwise indicated, has been supplied.

Respondent seeks, however, to evade a holding by this Court that the Ohio constitutional provision fails to meet the *federal* standards of the Fifth Amendment, now applicable to the states as a result of *Malloy v. Hogan, supra,* by urging that (A) the "no comment" rule[2] is not a requirement of the Fifth Amendment;[3] (B) the provision of the Ohio Constitution here involved has been upheld in Ohio, denied review by this Court and hence its constitutional validity is settled;[4] (C) since the prosecutor's comment to the jury is not technically evidence, a jury charge by the Court that the state must establish the guilt of the accused by evidence beyond a reasonable doubt cures any constitutional impediment;[5] (D) since the prosecutor's comment only points out what would be obvious to the jury without his comment, it is not prejudicial;[6] and (E) petitioner has neither properly preserved the issues for review nor shown prejudice requiring reversal.

These contentions will be considered in sequence below.

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[2] Unless otherwise indicated, the "no comment" rule as used in this brief will include not only prohibition of the prosecutor's adverse comment to the jury, but also the court's charge to the jury that it may consider the silence of the accused as an element of guilt.

[3] RB. 6-10, 15-16.

[4] RB. 10-12.

[5] RB. 11-12.

[6] RB. 12-14.

A.

The "no comment" rule is a command of the Fifth and Fourteenth Amendments.

There can be little argument with the contention that the "no comment" rule as employed in the federal courts has not yet been squarely held to be a requirement of the Fifth Amendment self-incrimination clause by this Court. Until *Malloy*, there was no need for this Court to consider the constitutional question in state criminal proceedings;[7] the existence of a federal statute on the subject[8] and this Court's supervisory function in federal criminal proceedings have precluded the necessity of adjudication of the constitutional question in federal criminal appeals.[9]

The tacit recognition by Respondent of the importance of the issue presented by this case[10] coupled with its persuasive argument that the question is an open one, compels the conclusion that, rather than opposing it, Respondent's Brief in fact *supports* the petition for writ of certiorari. Nevertheless, even in the absence of a direct holding on the question, there is abundant authority, based upon sound reasoning, in the remarks of individual justices of

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[7] How close this Court has come to deciding this issue without actually doing so in *Twining v. New Jersey*, 211 U. S. 77 (1908) and *Adamson v. California*, 332 U. S. 46 (1947) has been abundantly described by Respondent. RB. 6-7.

[8] 18 U. S. C. A. § 3481.

[9] E.g., *Wilson v. United States*, 149 U. S. 60 (1893); *Bruno v. United States*, 308 U. S. 287 (1939).

[10] There is no need to belabor the obvious fact that the issues presented here are central to the conduct of state criminal proceedings, not only in the six states which, by statute or judicial decision, permit comment upon, and consideration of, the exercise of the privilege, see *DeLuna v. United States*, 308 F. 2d 140, 151, f.n. 35 (5th Cir. 1962), but also in the other states, which in the absence of federal constitutional compulsion, may enact similar legislation. Nor should the potential effect upon *federal* criminal prosecutions of a holding that the "no comment" rule is of constitutional, as well as statutory, origin, be ignored.

this Court and lower court opinions to support petitioner's contention that this Court should in interpreting the breadth of the Fifth Amendment, strike down the provision of the Ohio Constitution permitting comment upon and consideration of the silence of the accused.

In *Johnson v. United States*,[11] affirming a federal conviction upon other grounds, Mr. Justice Douglas, speaking for the Court, took occasion to remark:

> "* * * where the claim of privilege is asserted and unqualifiedly granted, *the requirements of fair trial may preclude any comment.* That certainly is true where the claim of privilege could not properly be denied."

Quoting with approval from *Phelin v. Kenderdine*, 20 Pa. 354, 363 (1853), the Court continued:

> " 'The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and *no inferences whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right.* The allowance of the privilege would be a mockery of justice, if either party is to be affected injuriously by it.' " [12]

And while limiting its remarks to the federal criminal proceeding before it, the Court forcefully continued:

> "When [the trial court] grants the claim of privilege but allows it to be used against the accused to his prejudice, we cannot disregard the matter. *That procedure has such potentialities of oppressive use that we will not sanction its use* in the federal courts over which we have supervisory powers * * *." [13]

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[11] 318 U. S. 189, 196 (1943).

[12] *Ibid.*

[13] *Id.* at page 199.

In *Stewart v. United States*,[14] Mr. Justice Black, speaking for the Court, has indicated in passing the constitutional basis of the federal statute upon which the federal "no comment" rule is based:

> "The Fifth Amendment * * * provides in unequivocal terms that no person may 'be compelled in any criminal case to be a witness against himself.' *To protect this right* Congress has declared that the failure of a defendant to testify in his own defense 'shall not create any presumption against him.' Ordinarily the effectuation of *this protection* is a relatively simple matter—*if the defendant chooses not to take the stand, no comment or argument about his failure to testify is permitted* * * *."

Within the past week at least two of the justices of this Court have broadly interpreted the self-incrimination clause of the Fifth Amendment to prohibit conduct by the trial court which, by utilizing the failure of the accused to testify in his own defense, "may jeopardize his chances of acquittal." [15]

The pertinent language of this Court in *Malloy v. Hogan* has already been referred to this Court's attention by petitioner.[16]

Nor may Respondent take great comfort from the fact that the federal "no comment" rule was originally based upon statutory, rather than constitutional authority in *Wilson v. United States*,[17] for the inferior courts in the

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[14] 366 U. S. 1, 2 (1961).

[15] Mr. Justice Black, dissenting in *United States v. Gainey*, ____ U. S. ____, 33 U. S. L. Week, 4200, 4206 (March 1, 1965). And see Mr. Justice Douglas, dissenting in part in the same case at 4607: "* * * this rule against comment on the defendant's silence is mandated by the Fifth Amendment because 'using a defendant's silence as evidence against him is one way of having him testify against himself.'"

[16] Petition, page 7.

[17] 149 U. S. 60 (1893).

federal system, in ever-accelerating tempo, have found a constitutional basis for the "no comment" rule even in the presence of federal statutory authority. In *DeLuna v. United States*,[18] the Fifth Circuit Court of Appeals held:

> "In a criminal trial in a federal court an accused has a constitutionally guaranteed right of silence free from prejudicial comments * * *"

In *United States v. Ragland*,[19] the Fourth Circuit Court of Appeals said:

> "The protection against self-incrimination embodied in the Fifth Amendment to the Constitution is a fundamental right, which has been, and should be, jealously guarded by the courts. Not only is it universally held that a defendant in a criminal case may not be required to testify, but *it is equally well-recognized that he need not testify, [and] that the prosecuting attorney may not comment on his failure to testify * * *. These are fundamental rights which must not be frittered away.*"

And, since *Malloy v. Hogan, supra*, the Sixth Circuit Court of Appeals, in a federal habeas corpus proceeding, has applied the federal "no comment" rule as a constitutional requirement in a state criminal proceeding in Ohio.[20] The Court's pertinent language follows:

> "The right contained in the Fifth Amendment that the accused in a criminal trial in the federal court shall not be compelled to be a witness against himself includes both the right not to testify and *the right that such failure to testify shall not be subject of comment by the Attorney for the prosecution* * * *"[21]

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[18] 308 F. 2d 140, 141 (5th Cir. 1962).

[19] 306 F. 2d 732, 736 (4th Cir. 1962).

[20] *United States v. Tehan*, 337 F. 2d 990 (6th Cir. 1964) petition for certiorari filed 2/4/65 *sub nom. Tehan v. Shott*, 33 U. S. L. Week 3275.

[21] *Id.* at 991.

> "* * * *the protection against self-incrimination under the Fifth Amendment includes not only the right to refuse to answer incriminating questions, but also the right that such refusal shall not be commented upon by counsel for the prosecution.*" [22]

It remains for this Court to give the Fifth Amendment in this context the "broad construction in favor of the right which it was intended to secure" [23] by holding that the "no comment" rule is a constitutionally required means of preserving the privilege against self-incrimination embodied in the Fifth Amendment applicable to the States through the Due Process clause of the Fourteenth,[24] for the reasons so well stated by Mr. Justice Murphy, dissenting in *Adamson v. California*;[25]

> "* * * the judge or prosecutor may comment on the failure of a defendant in a criminal trial to explain or deny any evidence or fact introduced against him * * *. [S]uch a provision compels a defendant to be a witness against himself in one of two ways:
>
> "1. If he does not take the stand his silence is used as a basis for drawing unfavorable inferences against him as to matters which he might reasonably be expected to explain. Thus he is compelled, through his silence, to testify against himself and silence can be as effective in this situation as oral statements.
>
> "2. If he does take the stand, thereby opening himself to cross-examination, so as to overcome the effects of the provision in question, he is necessarily

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[22] *Id.* at 992.

[23] *Counselman v. Hitchcock*, 142 U. S. 547, 562 (1892). See also *Quinn v. United States*, 349 U. S. 155, 162 (1950) and *Ullmann v. United States*, 350 U. S. 422, 426 (1955).

[24] There is ample precedent for holding a procedural rule of criminal trial practice to be constitutionally required in order to enforce a broader substantive right. E.g. *Mapp v. Ohio*, 367 U. S. 643 (1961).

[25] 332 U. S. 46, 124-25 (1947).

compelled to testify against himself. In that case his testimony on cross-examination is the result of coercive pressure of the provision rather than his own volition * * *.

"This guarantee of freedom from self-incrimination is grounded on a deep respect for those who might prefer to remain silent before their accusers."

B.

The constitutional validity of the provision of the Ohio Constitution in issue here is not well settled at all.

Apparently in an attempt to urge that its validity is well settled, respondent has made much of the fact that Ohio courts have upheld the provision of the Ohio Constitution in issue here[26] and that this Court, in 1963, denied certiorari in *Shott v. Tehan*,[27] an Ohio case questioning the constitutionality of the same provision,[28] * * *. Quite apart from the lack of substantive significance to be accorded orders of this Court denying writs of certiorari,[29] the fact which appears to have escaped respondent is that all of the state cases cited in its brief were decided before this Court's landmark decision in *Malloy v. Hogan*,[30] applying the self-incrimination clause of the Fifth Amendment to the States, and that, as a consequence, until the case at bar, in which the Ohio Supreme Court, after *Malloy v. Hogan*, dismissed petitioner's appeal "for the reason that no substantial constitutional question" was presented to it, *the Ohio courts were never required to measure the*

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[26] RB. 11.

[27] 373 U. S. 240, rehearing denied 374 U. S. 858 (1963).

[28] RB. 12.

[29] See opinion of Mr. Justice Frankfurter denying certiorari in *Maryland v. Baltimore Radio Show*, 338 U. S. 912, 917-20 (1950).

[30] 378 U. S. 1 (1964).

Ohio constitutional provision against the standards of the Fifth Amendment self-incrimination clause. A vivid illustration of the difference in result occasioned by the interposition of *Malloy v. Hogan* upon otherwise similar facts is available for examination.

Although respondent's brief describes in detail the refusal of this Court to review a conviction in which the Ohio constitutional provision was under attack *before Malloy v. Hogan*, in *Shott v. Tehan*,[31] it fails to report the subsequent history of the case. *After Malloy v. Hogan*, the Sixth Circuit Court of Appeals granted a federal habeas corpus application to that same defendant on the same facts.[32] Moreover, this Court has granted certiorari in *Griffin v. California*,[33] a California case which, under that state's constitution, raises the question upon facts not unrelated to those in the instant case[34] of the propriety of comment by counsel upon the silence of the accused. Perhaps this action may permit speculation that the Court has more

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[31] 373 U. S. 240, rehearing denied 374 U. S. 858 (1963), mentioned at RB. 12.

[32] *United States v. Tehan*, 337 F. 2d 990 (6th Cir. 1964) petition for certiorari filed 2/4/65, *sub nom. Tehan v. Shott*, 33 U. S. L. Week 3275. See discussion of this case, *supra*, pp. 8-9.

[33] No. 202, October Term, 1964.

[34] Petitioner has distinguished the issues raised by the facts and counsel in *Griffin v. California* from those in the case at bar in a motion to consolidate both cases presently pending before this Court. For the Court's convenience, that motion to consolidate is appended to this reply brief. Since the motion to consolidate was filed, however, this Court has decided *United States v. Gainey*, No. 13, October Term, 1964, 33 U. S. L. Week 4200 (March 1, 1965) in which it held that a jury instruction which presumed the proof of an element of the offense charged, unless the defendant explained it away by other evidence, was not a comment on the failure of the accused to testify within the meaning of the federal "no comment rule." This holding points up the distinction between the language of the Constitutions of California and Ohio—a distinction, if the *Gainey* rule should be extended only slightly, with a constitutional difference.

than a passing interest in examining the Fifth Amendment implications of the "no comment" rule in state criminal proceedings in the wake of *Malloy v. Hogan*.

Petitioner contends that the respondent's still life view of the decided case authority has little value in determining the issues presented by this case; rather the cases should be examined "by considering their origin and the line of their growth." [35]

C.

A jury charge by the court that the state must establish the guilt of the accused by evidence beyond a reasonable doubt does not cure the constitutional defect.

Distinguishing the prosecutor's *argument* to the jury from *evidence* in the case, respondent apparently claims that any defect in the trial related to comment by counsel or consideration by court or jury of the failure of the accused to testify in his own defense was cured by the court's charge to the jury that "the prosecution must establish [the defendant's] guilt *by the evidence* beyond a reasonable doubt." [36]

To suppose that after the insinuating comment by the prosecutor, fortified by the court's charge to the jury that it might consider "the failure of the defendant to take the stand in his own behalf" along with "all the other * * * evidence in determining whether or not the defendant is guilty * * *," [37] the jury was able to distinguish between the evidence and argument in convicting the petitioner involves a flight of fancy to which petitioner cannot, and urges that this Court should not, subscribe. For the task assigned to this jury by the two confusing, if not conflict-

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[35] *Gompers v. United States*, 233 U. S. 604, 610 (1915).

[36] RB. 11.

[37] R. 54-55, reported in full at P. 4-5.

ing, instructions of the court was "a mental gymnastic which is beyond, not only their power, but anybody's."[38]

Moreover, it should be pointed out that where unconstitutional procedure has tainted a hearing or trial, the test of reversal is whether there is a *reasonable possibility* that the unconstitutional procedure *might have contributed* to the result. See *Fahy v. Connecticut*, 375 U. S. 85 (1963).

D.

The prosecutor's comment and the court's charge to the jury were prejudicial to defendant even though, in the absence of such comment and instructions, the jury might have considered the failure of the accused to testify.

Respondent contends that, whether or not the prosecutor commented upon, and the court instructed the jury it could consider the defendant's failure to testify, the jury in any event would have considered the silence of the accused in the face of the charge against him as proof of his guilt, and that the behavior of the prosecutor and court in this respect was, consequently, constitutionally innocuous.

The constitutional difference between natural inferences which may be drawn from evidentiary facts and affirmative acts by state officials operating under color of legal authority designed to procure, and having the actual effect of procuring, the same inferences by a jury should

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[38] Judge Learned Hand in *Nash v. United States*, 54 F. 2d 1006, 1007 (2d Cir. 1932). And see Mr. Justice Jackson's more general comment in *Krulewitch v. United States*, 336 U. S. 440 (1949):

"[T]he naive assumption that prejudicial effects can be overcome by instructions to the jury * * *, all practicing lawyers know to be unmitigated fiction."

require little comment. "Even if it were true that reasonable men cannot avoid drawing 'natural inferences from an accused's silence,' that is quite a different thing from having the silence emphasized by comment. The imputation of guilt from silence, if it does nothing else, may confuse the jury as to the presumption of innocence in favor of the accused." [39]

E.

Petitioner has properly preserved the issues for review and shown prejudice.

Finally, respondent contends that even if the Ohio Constitution and the Ohio statute which authorize the behavior of court and prosecutor from which petitioner here seeks relief are repugnant to the command of the Fifth Amendment, this Court ought not to so hold, because petitioner has neither properly preserved the issue for review nor shown prejudice resulting from the behavior of the court and prosecutor.

Without speculating as to the kind or strength of proof of causal relationship between the trial conduct in issue and the conviction necessary to demonstrate prejudice sufficient, according to respondent's standards, to compel reversal of the conviction, this Court has held that, where a constitutional question has been raised, no such causal relationship need be shown, even if the state in whose court the trial took place has a more stringent rule of prejudicial error. *Fahy v. Connecticut*, 375 U. S. 85 (1963). If there is a *reasonable possibility* that the unconstitutional procedure *might have contributed* to the result, this is a sufficient showing to permit this Court to review the case, no matter how harsh the state rule. Even

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[39] *DeLuna v. United States*, 308 F. 2d 140, 152 (5th Cir. 1962).

by more strict standards than these, but certainly by these standards, the record amply demonstrates the required prejudicial effect to permit review here.

Moreover, quite apart from the fact that trial in the case at bar took place before this Court overruled *Adamson v. California*[40] and *Twining v. New Jersey*[41] in *Malloy v. Hogan*,[42] defense counsel in the trial below has properly preserved the issues for review by this Court.

Although it is true that for tactical reasons, the defense made no specific objection to the comment of the prosecution during argument, it is well settled under Ohio law that questions of misconduct of counsel in argument may be preserved even in the absence of contemporaneous objection by the aggrieved party. *Landesman v. Western Reserve University*, 132 Ohio St. 131 (1936); *Thatcher v. Penn, O & D Rd. Co.*, 33 Ohio App. 242, 246 (Lucas 1928); *Hayes v. Smith*, 62 Ohio St. 161 (1960).

So far as respondent's claim that no specific objection to the charge of the Court was made,[43] petitioner objected generally to the charge at the time of trial.[44] No more is required of counsel under Ohio law in order to preserve for review his contention that the jury charge was affirmatively erroneous. Section 2321.03, Ohio Revised Code; *Rosenberry v. Chumney*, 171 Ohio St. 48 (1960); *Simko v. Miller*, 133 Ohio St. 345 (1938).

Nor is petitioner aware of how respondent's argument is advanced by the recitation that defense counsel advised

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[40] 332 U. S. 46 (1947).

[41] 211 U. S. 77 (1908).

[42] 378 U. S. 1 (1964). A circumstance which might evoke a more lenient determination of the question of whether the record preserves the issue for review.

[43] RB. 15.

[44] R. 58.

the jury upon *voir dire* and in opening statement as a technical matter that the accused had a previous criminal record.[45] If respondent's point is that the jury was voluntarily advised by defense counsel of the only fact apart from guilt which would justify an accused in refusing to testify, the principal premise of this *non-sequitur* is not supportable even in fact.

As this Court has pointed out in *Wilson v. United States*: [46]

> "It is not everyone who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not everyone, however honest, who would, therefore, willingly be placed on the witness stand."

* * * * *

The grant of review of this case, and reversal of the state court conviction below will strengthen the effectiveness of the self-incrimination clause of the Fifth Amendment, as applied to state criminal procedure by giving renewed meaning to the fundamental consideration expressed by Mr. Justice Black, concurring in *Grunewald v. United States*, 353 U. S. 391, 425 (1957):

> "[There are] no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of these constitutional privileges is largely destroyed if persons can be penalized for relying on them."

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[45] RB. 15.

[46] 149 U. S. 60, 66 (1893).

CONCLUSION.

For the foregoing reasons, as well as for the reasons set forth in his petition for writ of certiorari, petitioner renews his prayer that the petition for writ of certiorari be granted.

Respectfully submitted,

BERNARD A. BERKMAN,
Counsel for Petitioner.

GEORGE S. ROEST,
Of Counsel.

In the Supreme Court of the United States

No. 789.
OCTOBER TERM, 1964.

RAYMOND D. HOWELL,
Petitioner,

v.

STATE OF OHIO,
Respondent.

APPLICATION TO CONSOLIDATE WITH ANOTHER PENDING CASE IN ADVANCE OF ARGUMENT OR, IN THE ALTERNATIVE, IN ADVANCE OF RE-ARGUMENT.

To the Honorable Potter Stewart,
Associate Justice of the United
States Supreme Court and Circuit
Justice for the Sixth Circuit:

The petitioner hereby respectfully applies for an order consolidating the within cause for argument with the case of *Griffin v. California*, No. 202, October Term, 1964, scheduled for oral argument during the week of March 8, 1965, or in the alternative, for an order consolidating the within cause with *Griffin v. California, supra*, for reargument at a time to be determined by this Court after the grant of certiorari in the within cause.

Petitioner believes that consolidation of his case with *Griffin* in such a manner that this Court may make disposition of both cases simultaneously on their merits will

permit a more orderly consideration of the general issue and a more effective and meaningful decision to be rendered on the principal issue raised in both cases:

> To what extent may an accused who fails or refuses to testify in his own defense in a state criminal proceeding be subjected to adverse comment during his trial for exercise of his constitutional right to remain silent as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution?

Petitioner contends that his case presents at least two facets of this issue which are different from that presented by *Griffin v. California;* that a decision of this Court based upon an analysis of the fact situations in both cases would provide greater clarity, and more guidance to state legislative and judicial bodies concerned with the administration of state criminal procedures in accordance with federal constitutional commands, than would an opinion based upon the *Griffin* facts alone; and that, as a consequence, this Court should, in some manner, consolidate both cases, hear consecutive arguments and render companion opinions.

There are two respects in which *Griffin v. California* and the instant case differ materially:

1. The Constitution of California, which permits the conduct of which petitioner in *Griffin* complains, provides, in pertinent part, as follows:

> "No person shall * * * be compelled, in any criminal case, to be a witness against himself; * * * but in any criminal case, *whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury.*" Article 1, Section 13, California Constitution (Emphasis supplied).

However, the Constitution of Ohio, which authorized the conduct from which petitioner in the instant case seeks the relief of this Court, provides, in pertinent part, as follows:

> "* * * No person shall be compelled, in any criminal case, to be a witness against himself, *but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel* * * *" Article I, Section 10, Ohio Constitution (Emphasis supplied).

Stated simply, the California Constitution permits comment upon the defendant's *refusal to meet evidence introduced against him by the state*, and, at least inferentially, suggests that such adverse comment would be limited to circumstances in which the accused, by his own testimony, could rebut the state's evidence.

The Ohio Constitution has no such limitations; it permits adverse comment by counsel and consideration by the court and jury of the mere *exercise* by the accused of his constitutional right to remain silent and off the witness stand, *whether or not the state has introduced any evidence against him which it is in his power to rebut.* If the California provision may be interpreted as a rule of evidence—a permissible inference to be drawn from unrebutted facts, and not a matter of infringement of constitutional rights,* the broad provision of the Ohio Constitution is not susceptible to such an interpretation, for its language permits an accused who does not testify to be castigated before the trier of fact for failure to state an

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* See argument of respondent on this point in *Griffin v. California*, Respondent's Brief, 20-21 and petitioner's weak response, Petitioner's Answer Brief, 4.

affirmative fact as well as for failure to *deny* the state's *affirmative* evidence. **

2. The petitioner in *Griffin* seeks reversal of his conviction in this Court on the issue of self-incrimination solely because of the prosecutor's conduct on final argument. Petitioner's Brief, 10-12. In the instant case, petitioner seeks reversal of his conviction not only on that ground, but also on the further basis that the charge of the Court to the jury was itself in contravention of the Fifth and Fourteenth Amendments. Petition for Writ of Certiorari, 2, 4, 8. Counsel for petitioner in *Griffin* waived this point. Petitioner's Brief, 10-12. It seems evident that, if the prosecutor's comment as a zealous and obviously partisan advocate upon the exercise of the privilege by the accused is material in determining the fairness of his trial, the calm and deliberate charge to the jury by the Court, cloaked with all the majesty, authority and impartiality of the state, is vital to that determination.

* * * * *

Petitioner has attempted to demonstrate the additional factors in his case which justify the joinder of his cause with that of *Griffin v. California*, from the standpoint of the great social and moral decisions which it is this Court's function to make and in view of the broad supervisory role over state criminal proceedings this Court has assumed as a result of its interpretation of the due process clause of the Fourteenth Amendment.

** In the instant case, the prosecutor commented on the failure of the accused to take the stand and testify "where he had been gainfully employed at any time * * *" (R. 46a), an *affirmative fact* not part of the state's proof of the offense of procuring a female under 18 years of age for purposes of prostitution in violation of Section 2905.10 Ohio Revised Code, of which petitioner was convicted.

It is true that this Court granted certiorari in *Griffin* before the court of last resort in Ohio had finally ruled in the case at bar* and that, as a consequence, *Griffin* is farther along the road to adjudication than is the instant case.**

But this Court's procedure is flexible enough to permit it to fashion a means of so doing, if, upon analysis, it should deem the consolidation of these causes advisable and valuable to the performance of its substantive adjudicatory function. See *Jacobellis v. Ohio*, 378 U. S. 184 (1964).***

WHEREFORE, it is respectfully requested that an order issue from this Court consolidating the within cause with that of *Griffin v. California*, in such manner as this Court may devise, so that both cases may be adjudicated by this Court in the same decision or in consecutive order.

Respectfully submitted,

BERNARD A. BERKMAN,
Counsel for Petitioner.

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* Petition for writ of certiorari in *Griffin v. California* was granted by this Court on June 22, 1964. The judgment of the Ohio Supreme Court from which petitioner seeks relief in the instant case was entered on September 23, 1964 and this case was docketed in this Court on December 28, 1964.

** *Griffin v. California* is scheduled for oral argument on the merits during the week of March 8, 1965. In the case at bar, petition for writ of certiorari and answer brief of respondent have been filed. This Court has not yet ruled on the petition.

*** In *Jacobellis v. Ohio* this Court heard argument initially on March 26, 1963 (31 U. S. L. Week 3318), but restored the case to the calendar on April 29, 1963 (31 U. S. L. Week 3353) upon granting certiorari in *Smith v. California* (31 U. S. L. Week 3353, April 29, 1963) in order to hear argument on the related issues in these two cases in sequence.

Certificate of Service.

A copy of the foregoing Application to Consolidate With Another Pending Case in Advance of Argument or, in the Alternative, in Advance of Re-argument was served upon Counsel for Respondent, Robert O. Stout, Prosecuting Attorney, Marion County, Ohio, 115 North Main Street, Marion, Ohio, by mailing to him a true copy of the application in an envelope duly addressed to him, bearing proper postage and deposited in the United States mail at Cleveland, Ohio, this 26th day of February, 1965.

BERNARD A. BERKMAN,
Counsel for Petitioner.